

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

3:05-CV-0461-ECR-RAM

ORDER

TROY GRIMES, individually and)
as the Special Administrator)
to the ESTATE OF TINA GRIMES,)
Deceased, AMY BEAN, JOSH)
BEAN, PAULA DUNCAN,)
individually and as the)
Special Administrator)
to the ESTATE OF BILLIE)
SMALLWOOD, Deceased, GAYLA)
LOZA, and MICHAEL HOWE,)
Plaintiffs,)

vs.)

COMBINED TRANSPORT, INC.,)
DONALD J. MURPHY, and DOES)
1 through 50, inclusive)
Defendants.)

DONALD J. MURPHY AND)
COMBINED TRANSPORT, INC.,)

Counterclaimants,)

vs.)

TROY GRIMES, individually and)
as the Special Administrator)
to the ESTATE OF TINA GRIMES,)
Deceased, AMY BEAN and JOSH)
BEAN and DOES I-X,)

Counterdefendants.)

1 This is a diversity action¹ involving an accident that
2 occurred on Interstate Highway 80 in Elko County on or about May
3 21, 2004. The accident involved a commercial truck and a passenger
4 vehicle. Both occupants of the passenger vehicle were killed.
5 Defendant Donald Murphy, the truck driver, filed a motion in limine
6 (#48) on June 21, 2006 and Defendant Combined Transport, the truck
7 company, filed a motion in limine (#52) on June 30, 2006.
8 Plaintiffs filed a single opposition (#57) to both motions on July
9 21, 2006. Defendant Murphy filed his reply memorandum (#62) on
10 July 21, 2006 and Defendant Combined Transport has filed no reply.

11 As a preliminary matter, Plaintiffs argue that Defendants'
12 motions are premature. The local rules require that motions in
13 limine be filed more than 30 days before trial unless otherwise
14 ordered by the court (see Local Rule 16-3),² but as a practical
15 matter, we agree that the motions are premature. As explained
16 below, with one exception we deny the motions without prejudice.

17 Defendant Combined Transport seeks exclusion of "character
18 evidence" related to the company's alleged non-compliance with
19 federal regulations and its alleged negligent hiring, supervision,
20 and retention of Defendant Murphy as a truck driver. Combined
21 Transport argues that the evidence is both irrelevant and unfairly
22 prejudicial. However, Plaintiffs' have made claims that directly

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24 ¹The Complaint filed in this case contains no statement of the
25 basis of this court's jurisdiction, as is required by Federal Rule of
Civil Procedure 8(a). Nevertheless, diversity jurisdiction appears
to exist in this case.

26 ²This case was re-assigned (#80) from Judge Sandoval to Judge
27 Reed on December 4, 2006. No scheduling order has been entered
altering the date set by the local rule.

1 rely on this evidence. Insofar as these claims are viable, the
2 argument that this evidence is not relevant is without merit.
3 Defendant Combined Transport's motion (#52) is **DENIED** without
4 prejudice. If Combined Transport wishes to do so, it may renew its
5 motion once the dispositive motions filed in this case have been
6 addressed by the Court. We emphasize that we are expressing no
7 opinion at this time regarding the viability of any of Plaintiffs'
8 twenty-three causes of action at this time.

9 Defendant Murphy's motion (#48) in limine seeks the exclusion
10 at trial of evidence of Murphy's prior citations, his prior
11 accident, his prior log book violations, his felony conviction for
12 sexual assault, as well as photos of the decedents that were taken
13 after the accident. Defendant Murphy also seeks to exclude what
14 Murphy characterizes as improperly disclosed expert opinions. The
15 issue of discovery and expert opinions was addressed by the
16 Magistrate Judge's decision on the record (#64) on July 26, 2006.
17 Finally, Defendant Murphy also seeks to prevent any mention of
18 insurance and any "golden rule" argumentation to the jury by
19 Plaintiffs' counsel; Plaintiffs state they have no intention to
20 mention insurance or make the so-called "golden rule" argument.

21 Thus, the items of evidence at issue are prior citations, a
22 prior accident, prior log book violations, the felony conviction,
23 and pictures of the decedents bodies taken after the accident.

24 Accident Photos

25 Defendant Murphy argues that accident photos of the decedents
26 are irrelevant and unfairly prejudicial. Plaintiffs argue that the
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1 photographs of the decedents are relevant as to the nature of the
2 crash, damages as well as the disputed speed of the vehicles. "A
3 photograph that presents gruesome details, such as crime scene or
4 autopsy photos, or photos of persons with personal injuries, may be
5 objected to as unfairly prejudicial but typically are admitted."
6 2 McCormick on Evidence § 215 (6th ed.) (citing Batchelor v. Cupp,
7 693 F.2d 859, 865 (9th Cir. 1982) (affirming admission of
8 photographs); and United States v. Yahweh, 792 F.Supp. 104
9 (S.D.Fla. 1992) (holding that neither gruesome photographs nor 30
10 by 40 inch enlargements were unfairly prejudicial)). See also
11 Walker v. Norris, 917 F.2d 1449, 1453 n.9 (6th Cir. 1990)
12 (summarily affirming district court's admission of post-accident
13 photographs).

14 Defendant Murphy's motion will be denied as to the accident
15 photographs for the reasons cited by Plaintiffs. Defendant Murphy
16 may renew his motion prior to trial with respect to size, quantity,
17 relevance, or on other grounds not addressed here. At such a time,
18 the photos shall be provided to the Court for review.

19 20 Prior Citations and Prior Accident

21 The evidence of prior citations and of a prior accident is
22 relevant to Plaintiffs' claim that Murphy was negligent in
23 violating federal regulations by not revealing his prior driving
24 record to Combined Transport. We will deny Murphy's motion with
25 regard to this evidence without prejudice. The motion may be
26 renewed, if Murphy wishes to do so, after the Court has addressed
27 the dispositive motions filed in this case.

Prior Log Book Violations

Based on the complaint and the current limited record, we can discern no way in which prior log book violations would be directly relevant to any claim in Plaintiffs' complaint against Murphy. Plaintiffs argue, however, that the log book violations could be used to impeach Murphy. The record is currently insufficient to evaluate whether or how this might be the case. In any event, the evidence of prior citations, a prior accident, and prior log book violations are all relevant, as explained above, to claims that are made against Combined Transport. These claims include, but are not limited to Plaintiffs' claim that Combined Transport was negligent in its retention of Murphy as an employee, and Plaintiffs' claim that Combined Transport maintained inadequate safety fitness standards. Federal Rule of Evidence 105 provides:

[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

While limiting instructions will not always be sufficient, it is not at all clear that a limiting instruction would be insufficient with respect to the evidence of prior log book violations.

Additionally, insofar as Murphy generally disputes that the prior log book violations can be considered a cause of the accident, it appears to be appropriate to deal with this issue after the dispositive motions in this case have been addressed. We therefore deny Murphy's motion without prejudice as to the prior log book violations.

Murphy's Felony Conviction

Finally, we turn to Murphy's prior sexual assault conviction. Evidence submitted by the Plaintiffs indicates that Defendant Murphy was sentenced by an Illinois state court to probation, community service and mandatory psychiatric treatment for sexually assaulting his child in 1988. The evidence also indicates that, in 1990, he was sentenced to four years in prison for violating his probation by committing "similar criminal acts." (Judgment Order of McHenry County Court in Illinois, April 4, 1990, attached as Ex. B to P.s' Opp. (#58), at 7). Both convictions are over ten years old. See Fed. R. Evid. 609(b).

Plaintiffs argue that the conviction is relevant to this case because Defendant Murphy certified that he had never been convicted of a felony in his job application. They claim that the misrepresentation is directly relevant to three of their causes of action: (1) their second cause of action against Combined Transport for negligent hiring, training, supervision, and retention; (2) their twelfth cause of action, which alleges that both Murphy and Combined Transport were negligent in violating federal regulations related to job applications (49 C.F.R. § 391.21); and (3) their thirteenth cause of action against Combined Transport, which alleges that the company was negligent in violating federal regulations requiring the company to investigate the background of its drivers (49 C.F.R. § 391.23). Plaintiffs also seek to impeach Defendant Murphy by showing or arguing that he misrepresented the nature of his probation violation in his deposition. Additionally,

1 and most problematically, Plaintiffs seek to impeach Murphy merely
2 by the fact of "his serious, morally corrupt, felonious conduct and
3 conviction."

4 On the one hand, the fact of Defendant's conviction is, on its
5 own, simply not probative of anything in this case as either direct
6 or impeachment evidence. We find that the conviction is
7 inadmissible under Federal Rule of Evidence 609(b), which deals
8 with the admissibility of convictions that are over ten years old.
9 On the other hand, Defendant Murphy's later misrepresentation about
10 the conviction is at least arguably probative of a violation of 49
11 C.F.R. § 391.21, and thus somewhat relevant to Plaintiffs' twelfth
12 cause of action. We note that this particular misrepresentation is
13 remote from any vehicular issues or issues of driving competence,
14 and, although the regulation requires that the driver certify the
15 truth of the contents of the application, the regulation does not
16 require any information about non-vehicular felonies to be
17 revealed. The misrepresentation about the conviction, as opposed
18 to the conviction itself, could also be considered as a "specific
19 instance of conduct," probative of Defendant Murphy's character for
20 untruthfulness. See Fed. R. Evid. 608(b). Plaintiffs state that
21 they seek to impeach both Murphy and employees of Combined
22 Transport with the conviction, based on Plaintiffs' assertion that
23 there is evidence that the employees knew about the conviction but
24 claimed that they did not.

25 To the extent that the misrepresentation is probative of any
26 relevant issues in this case at all, its probative value is
27 substantially outweighed by the danger that the jury will
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1 improperly factor the conviction for sexual assault into its
2 consideration of the evidence in this case. Fed. R. Evid. 403(b).
3 Thus, we find that so long as Defendant Murphy does not deny that
4 he lied on his job application, the parties shall be prohibited
5 from making any reference whatsoever to the prior felony conviction
6 at trial.

7
8 **CONCLUSION**

9 For the reasons stated above, **IT IS HEREBY ORDERED** that

10 (1) Defendant Combined Transport's motion in limine (#52) is
11 **DENIED** without prejudice.

12 (2) Defendant Murphy's motion in limine (#48) is **DENIED** with
13 respect to the accident photos of the decedents. Defendant Murphy
14 may renew his motion with respect to the size, quantity or
15 relevance of the photos prior to trial. At such a time, he shall
16 provide the Court with copies of the photos at issue.

17 (3) Defendant Murphy's motion in limine (#48) is **GRANTED** with
18 respect to Murphy's prior felony conviction. So long as Defendant
19 Murphy does not deny that he lied on his job application, the
20 parties shall be prohibited from making any reference whatsoever to
21 the prior felony conviction at trial.

22 (4) Defendant Murphy's motion in limine (#48) is **GRANTED** with
23 respect to references to insurance and "golden rule" argumentation
24 because the motion is undisputed.

25 (5) Defendant Murphy's motion in limine (#48) is **DENIED** as
26 moot with respect to revised expert opinions.

1 (6) Defendant Murphy's motion in limine (#48) is **DENIED**
2 without prejudice in all other respects.

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4 DATED: This 28th day of December, 2006

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7 UNITED STATES DISTRICT JUDGE
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